

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
EL PASO DIVISION**

**GRACIELA GALINDO, *et al.*,**

§

**Plaintiffs,**

§

v.

**EP-10-CV-454-DB**

**REEVES COUNTY, TEXAS, *et al.*,**

§

**Defendants.**

§

**BOP DEFENDANTS' MOTION TO DISMISS OR,  
IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT**

COME NOW Defendants, BURRELL, NACE, DE JESUS, and GRUBE, (BOP Defendants)

Individually, by and through the United States Attorney and pursuant to Rule 12, Federal Rules of Civil Procedure, file this Motion to Dismiss or, in the Alternative, Motion for Summary Judgment, pursuant to Rule 56, Federal Rules of Civil Procedure, in the above-entitled cause and would show the Court as follows:

**I. PRELIMINARY MATTERS**

**A. Procedural History**

Plaintiffs filed their Original Complaint in the above styled and numbered lawsuit on December 7, 2010 (*Galindo I*). Plaintiffs named REEVES COUNTY, TEXAS; THE GEO GROUP, INC.; PHYSICIANS NETWORK ASSOCIATION; and in their individual capacities: VERNON FARTHING, M.D.; WALTER BRADY, D.O.; RICHARD FEARS, P.A.; JAMES FITCH; LOU ANN MILLSAP, R.N.; FNU BULLOCK; Warden DWIGHT SIMS; Capt. CHAD DEVIVO; Lt. KENNETH MARTIN; JAMES BURRELL, Federal Bureau of Prisons (BOP) Privatization Management Branch Administrator; MATTHEW NACE, Chief, BOP Acquisitions Branch;

EDUARDO DE JESUS, M.D., BOP Medical Auditor; and DONNA GRUBE, BOP Contracting Officer, as Defendants. Plaintiffs alleged a *Bivens*<sup>1</sup> cause of action against BOP Defendants.

On July 1, 2011, Plaintiffs filed a motion for leave to file a first amended complaint in which they sought to amend some of their allegations against some of the non-BOP Defendants. (Doc. 99.) On July 5, 2011, Plaintiffs filed a separate Complaint in which they named the United States of America as the sole Defendant. *Galindo, et al., v. United States of America*, EP-11-CV-280-DB (*Galindo II*). In *Galindo II*, Plaintiffs assert an FTCA cause of action against the United States based on the same set of facts as alleged in *Galindo I*. The United States was served with this Complaint on July 11, 2011. As per agreement, the responsive pleadings to *Galindo I* and *Galindo II* by the BOP Defendants and the United States of America, respectively, are due on or before, August 15, 2011.

In *Galindo I*, Plaintiffs allege two separate causes of action against the BOP Defendants. The causes of action against BOP Defendants are identified as the Ninth and Tenth Causes of Action in Plaintiffs' Amended Complaint.

In the Ninth Cause of Action, Plaintiffs allege that Defendants Nace and Burrell violated Jesus Manuel Galindo's (Decedent) Eighth Amendment rights in awarding a contract to Reeves County, who subcontracted with GEO and PNA, to operate the Reeves County Detention Center III (RCDC III), in spite of the alleged prior incidents of providing inadequate medical care to inmates at other facilities. (Doc. 108, ¶¶ 378-380.)

In the Tenth Cause of Action, Plaintiffs allege that Defendants Burrell, Grube and De Jesus violated Decedent's Eighth Amendment rights by "[f]ailing to remedy serious deficiencies in the

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<sup>1</sup>*Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

provision of medical care at RCDC III that are linked to Mr. Galindo's death and by failing to halt the open and notorious use of segregated housing to isolate and punish prisoners with serious medical needs at RCDC III." (Doc. 108, ¶ 385.)

**B. Plaintiffs' Factual Allegations**

**1. Detention of Jesus Manuel Galindo**

On November 26, 2007, Decedent, a Mexican national, was sentenced to serve 30 months for illegal reentry into the United States. (Doc. 108, ¶ 89.) Decedent was remanded to BOP custody, and on December 20, 2007, began serving his prison sentence at RCDC III. (Doc. 108, ¶¶ 92, 104.)

Decedent suffered from epilepsy, which Plaintiffs allege was inadequately treated by PNA staff. Plaintiffs further allege that the ill effects of PNA's inadequate treatment were compounded by GEO staff's decision to at times place Decedent in the Special Housing Unit ("SHU"). On December 12, 2008, Decedent died during an epileptic seizure he suffered while he was being housed in the SHU. (Doc. 108, ¶ 94.)

Plaintiffs allege that PNA medical staff treated Decedent with an anti-seizure medication that was less effective than the medication Decedent had been taking prior to incarceration at RCDC III and further, had not been providing Decedent with the proper dosage of his medication. (Doc. 108, ¶ 95.) Plaintiffs do not allege that Decedent was denied medical treatment, only that he was provided the improper treatment. Indeed, Plaintiffs' Amended Complaint is replete with factual assertions wherein Decedent received some medical treatment, albeit allegedly negligent treatment. (Doc. 108, ¶¶ 101-135.)

2. Ninth Cause of Action

In support of their Ninth Cause of Action against Defendants Nace and Burrell, Plaintiffs allege that PNA had a documented history of medical incompetence and outright indifference to the medical needs of inmates. (Doc. 108, ¶ 254.) Plaintiffs assert that prior to awarding the contract to Reeves County, Defendants Nace and Burrell had a duty to review the past performance of Reeves County, GEO and PNA. (Doc. 108, ¶ 257.)

In an effort to establish prior knowledge on the part of Defendants Nace and Burrell, Plaintiffs assert that in 2003, the United States Department of Justice issued a report which was highly critical of the medical services provided by PNA at a correctional facility in Santa Fe, New Mexico. (Doc. 108, ¶ 261.)

Plaintiffs further allege that GEO was the topic of testimony before Congress in 2002 which was critical of GEO's management of a correctional facility that housed inmates from Washington D.C. Plaintiffs assert that Defendants Nace and Burrell failed to reasonably inquire into the past performance of GEO and PNA at these facilities. (Doc. 108, ¶¶ 268-269.)

Finally, Plaintiffs reference a class action suit currently pending in the Eastern District of North Carolina which has been filed and is currently pending before that court. (Doc. 108, ¶ 295.)

Plaintiffs do not provide any factual allegations establishing that either Defendant Burrell or Nace were actually aware of the alleged deficiencies noted by Plaintiffs in their Amended Complaint. Instead, Plaintiffs assert the general conclusion that Defendants Nace and Burrell either knew or "willfully" ignored these incidents.

3. Tenth Cause of Action

In support of their Tenth Cause of Action against Defendants Burrell, Grube and De Jesus, Plaintiffs allege that these Defendants violated Decedent's Eighth Amendment rights by failing to “[r]equire improvements in the provision of medical services or the way segregated housing was used by PNA, GEO and Reeves County...” (Doc. 108, ¶ 280.)

Plaintiffs assert that Reeves County, GEO, and PNA had a history of misusing segregated housing to punish sick inmates and conspired to deprive them of access to necessary medical care. (Doc. 108, ¶ 281.) Plaintiffs assert that Defendants Burrell, Grube and De Jesus had an obligation to monitor the contract performance by Reeves County, GEO and PNA. (Doc. 108, ¶¶ 286-288.) Plaintiffs assert that in their role as monitors of the contract, these BOP Defendants had access to information which would reveal the alleged abuses committed by PNA. (Doc. 108, ¶¶ 287-290.)

Plaintiffs cite to two cases of alleged abuse at RCDC III. One case is that of the Decedent and the other is that of Reyes Garcia Rangel, an inmate who committed suicide at RCDC in August 2008. (Doc. 108, ¶ 296.) Plaintiffs do not allege that Rangel was denied medical treatment or that Rangel died as a result of alleged inadequate treatment.

Plaintiffs generally allege that these BOP Defendants either “knew, or should have known,” of the deficiencies in medical care being provided at RCDC III. (Doc. 108, ¶ 298.) Plaintiffs do not assert any factual allegations establishing that any of these Defendants were actually aware of the alleged deficiencies in medical care. Nor do Plaintiffs allege that any of the Defendants were aware of Decedent, his medical condition or the alleged inadequate care being provided to him.

**C. Factual allegations of BOP Defendants**

In 2005 the BOP solicited Requests for Proposals (RFPs) to operate a low-security prison facility that would house federal criminal prisoners, primarily a criminal alien population. (*See Exhibit 1, Declaration of Matthew Nace.*) Defendant Burrell served as the Source Selection Official for this process. (*See Exhibit 2, Declaration of James Burrell.*)

The RFPs were processed in accordance with applicable Federal Acquisitions Regulations (FAR), Justice Acquisitions Regulations (JAR) and Bureau of Prisons Acquisitions Policy (BPAP) guidelines. During the final phase of the selection process only three proposals remained for consideration. The bid submitted by Reeves County was one of the remaining bids. The factors that the BOP was permitted to take into consideration in the selection process were dictated by the Source Selection Acquisition Plan (SSAP). These factors, and their respective importance, were: 1) Past Performance and Experience - 50%; 2) Technical- 35%; 3) Environmental - 5%; 4) Notification to Chief Law Enforcement Officer - 5%; and 5) Small Disadvantaged Business Utilization - 5%. As further stated in the acquisition plan, price was not scored and would be used as a deciding factor only if the non-price factors were more equal. (*See Exhibit 2.*)

As the Source Selection Official, it was the duty of Defendant Burrell to ensure that the proposals were evaluated solely on the factors and sub factors contained in the solicitation. Defendant Burrell made a comparative assessment of proposals submitted in response to the RFP against all evaluation criteria in the solicitation. The BOP also utilized a Source Selection Evaluation Board (SSEB) and a Contracting Officer to evaluate the bid proposals. Defendant Burrell's comparative assessment was supported by the evaluation reports of the SSEB and the Contracting Officer. (*See Exhibit 2.*)

Based on a comparison of the three proposals, the Contracting Officer compiled the following final scores: CCA received 856.7 points; Reeves County received 767.33 points and Cornell received 753.69 points for the non-price factors. In the category of Past Performance, Reeves County submitted updated past performance information which indicated that they had re-engineered their Quality Control Plan which was specifically tailored to the BOP contract facility monitoring (CFM) guidelines. Additionally, the Reeves County complex had recently undergone their annual review by the Texas Commission on Jail Standards and received a perfect score of 100%. (*See Exhibit 2.*)

The Contracting Officer assigned to assist on this RFP also performed a price evaluation in accordance with FAR 1S.30S(a) (l), and determined a blended per diem rate at the two year mark to be as follows: CCA - \$63.52, Reeves - \$42.00, Cornell - \$50.14 (population of 920) and \$45.00 (population of 1380). Defendant Burrell determined the non-price factors to be essentially equal and therefore price became the deciding factor. Reeves County was the apparent lowest priced offer and therefore was awarded the contract. (*See Exhibit 2.*)

The contract to Reeves County was awarded in compliance with the FAR and other applicable regulations. Defendant Nace signed the contract on behalf of the BOP, after it had been reviewed by the Compliance Review Section and recommended by the Source Selection Official. (*See Exhibit 1.*) Neither Defendants Burrell nor Nace were aware of any basis which would have precluded the BOP from awarding the contract to Reeves County. (*See Exhibits 1 and 2, respectively.*)

As part of its contracts with privately run facilities, the BOP sends a review team on a semi-annual basis, to conduct a review of these contract facilities. The review team evaluates all aspects of the contract facility, to include health care services. A semi-annual review was conducted of

RCDC III on June 18-19, 2008. Defendant De Jesus was part of the review team that evaluated the health services being provided at RCDC III. In conducting the reviews, Dr. De Jesus would choose a random sample of records of inmates in the categories described in the Quality Assurance Plan (QAP). He would then evaluate the records and determine whether or not the medical care provided was in accordance with policies. Dr. De Jesus would then write a report and submit it to the Monitor in Charge, who would then complete a preliminary report. The preliminary report would then be submitted up the chain of command for a final report. In June 2008, the medical services at RCDC III were rated as “Acceptable” in the final report. (*See Exhibit 3, Declaration of Daniel De Jesus, M.D.*)

Dr. De Jesus’ entire work is based on reviewing records. Due to the volume of records, it is impossible to review all the records for all the inmates; therefore, only a sample is selected at random. In his role as a reviewer, Dr. De Jesus does not have the authority to compel any changes at a contract facility. (*See Exhibit 3.*)

Donna Grube is employed by the BOP as a Contract Specialist. She began her employment with the BOP in August 2008. Prior to that date, she did not have any knowledge of GEO or PNA. As a Contract Specialist, it was the duty of Defendant Grube to administer contracts DJB1PC003 and DJB1PC007 for the BOP. Both privatized contracts are with Reeves County with sub-contractors GEO and PNA. Defendant Grube did not participate in the awarding of these contracts. (*See Exhibit 4, Declaration of Donna Grube.*)

Defendant Grube has no specific recollection of Decedent. Defendant Grube does recall asking the warden about why a particular inmate with medical concerns was in the SHU during the approximate time period relevant to this lawsuit. The warden informed Defendant Grube that the

inmate was in the SHU so that they could monitor his condition closely and for his own protection. The response seemed reasonable to Defendant Grube and she had no reason to question it. (*See Exhibit 4.*)

Under the terms of the contract with Reeves County, the BOP did not have the power to terminate, direct, or otherwise interrupt the employment of GEO or PNA staff. (*See Exhibit 4.*)

Accreditation by the American Correctional Association (“ACA”) and the Joint Commission on Accreditation of Healthcare Organizations (“JCAHO”) are a requirement of the contract with Reeves County. (*See Exhibit 1.*)

The ACA is an independent, non-governmental agency, that evaluates and accredits correctional facilities. The ACA performed an audit of RCDC III in September 2008 and evaluated the entire operation at RCDC III, to include the medical services provided to inmates. At the conclusion of the audit, the ACA found RCDC III to be 100 percent in compliance with all applicable mandatory standards and 99 percent in compliance with all applicable non-mandatory standards. (*See Exhibit 5, Commission on Accreditation for Corrections, Standards Compliance Initial Audit.*).

JCAHO is also an independent, non-governmental entity and performs audits and accreditation of facilities that provide health care, such as hospitals and clinics. JCAHO performed an audit of RCDC III in January 2009. As a result of the audit, JCAHO granted PNA accreditation for all services surveyed. The accreditation was effective from February 27, 2009 and was valid for up to 39 months. (*See Exhibit 6, Correspondence from JCAHO to PNA, dated April 15, 2009.*)

## **II. ARGUMENT AND AUTHORITIES**

### **A. Standards of Review**

#### **1. Motion to Dismiss Standard**

Motions to dismiss under Rule 12(b)(6) for failure to state a claim are appropriate when a defendant attacks the complaint because it fails to state a legally cognizable claim. Fed. R. Civ. P. 12(b)(6); *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (per curiam). To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead enough facts to state a claim to relief which is plausible on its face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

In considering a motion to dismiss for failure to state a claim, a court must accept as true the well pleaded factual allegations and any reasonable inferences to be drawn from them in a plaintiff's complaint. *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994). However, while detailed factual allegations are not necessary, a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. *Twombly* established a "plausibility standard" at the pleading stage that requires a plaintiff to present factual allegations sufficient to raise a right to relief above the speculative level such that the allegations plausibly suggest that the pleader is entitled to relief. *Id.* at 557. Under *Twombly*, a plaintiff must plead enough facts to state a claim for relief that is plausible on its face, meaning facts that "nudge[] [a claim] across the line from conceivable to plausible." *Id.* at 570.

Under the "facial plausibility" standard, a plaintiff must plead factual content under Rule 8 of the Federal Rules of Civil Procedure such that it allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citation omitted). *Iqbal* also changed "the tenet that a court must accept as true all of the

allegations contained in the complaint” finding that rule to be inapplicable to legal conclusions. *Id.* “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice.” *Id.* As a result, “where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged –but it has not ‘show[n]’ – ‘that the pleader is entitled to relief.’ ” *Id.* at 1950 (quoting Fed. R. Civ. Pro. 8(a)(2)). In other words, a complaint which, as here, does no more than recite the legal elements of a purported *Bivens* claim, cannot survive a motion to dismiss, and non-conclusory allegations must plausibly allege a plaintiff’s entitlement to relief.

## 2. Summary Judgment Standard.

In many situations, a movant bears the burden of showing there is no genuine issue of material fact, but the assertion of qualified immunity “alters the usual summary judgment burden of proof.” *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010). “When a defendant invokes qualified immunity, the burden is on the plaintiff to demonstrate the inapplicability of the defense.” *McClellan v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002) (en banc). The plaintiff “must rebut the defense by establishing a genuine fact issue as to whether the official’s allegedly wrongful conduct violated clearly established law.” *Brown*, 623 F.3d at 253 (citation omitted).

## **B. Plaintiff’s claims should be dismissed for failure to state a claim**

Plaintiffs assert a claim against Defendants Nace and Burrell for alleged violation of Decedent’s Eighth Amendment Rights in awarding a contract to Reeves County to house BOP inmates in RCDC III. Plaintiffs assert a claim against Defendants Burrell, De Jesus and Grube for alleged violation of Decedent’s Eighth Amendment Rights in failing to monitor the performance under the contract with Reeves County, GEO and PNA.

All of Plaintiffs' claims, however, arise from the alleged negligent medical care provided to Decedent while incarcerated at the RCDC III and his being housed in the SHU. Plaintiffs do not allege that any of the BOP Defendants were directly involved in any challenged decision pertaining to Decedent. Specifically, Plaintiffs do not allege that any of these named Defendants were involved in the decision to house Decedent at RCDC III, that any of these Defendants were involved in the decision to house Decedent in the SHU, or that any of these Defendants were involved in any of the medical decisions pertaining to Decedent.

Plaintiffs' claims against the BOP Defendants for deprivation of the Decedent's constitutional rights under the Eighth Amendment to the United States Constitution are derived from *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In *Bivens*, the Supreme Court held that money damages may be recovered against a federal official for violation of a plaintiff's constitutional rights. However, in order to prove a *Bivens* claim, a plaintiff must demonstrate that he was deprived of a constitutional right. See *Enplanar, Inc. v. Marsh*, 11 F.3d 1284, 1295 (5th Cir. 1994), citing *Zernial v. United States*, 714 F.2d 431, 435 (5th Cir. 1993).

The crux of Plaintiffs' claims against Defendants Burrell and Nace in their Ninth Cause of Action arises from the contracting process that resulted in a contract being awarded to Reeves County to house federal inmates at RCDC III. This process was concluded prior to Decedent being housed in the RCDC III and almost two years prior to his death. While the constitutionally protected rights of an inmate may be implicated in the manner in which a prison facility is run, Plaintiffs have failed to establish that Decedent had any constitutionally protected right in the contracting process that concluded prior to his incarceration.

In their Tenth Cause of Action against Defendants Burrell, De Jesus and Grube, Plaintiffs' claims arise from the alleged failure of these Defendants to properly monitor the contract with Reeves County to ensure that either Reeves County, GEO or PNA were in compliance with the terms of the contract. Again, while an inmate's constitutionally protected rights may be implicated in the manner in which a prison facility is run, Plaintiffs have failed to establish that Decedent's constitutionally protected rights were implicated in the manner in which the BOP Defendants monitored a contract being performed by a private provider.

Absent any legal authority establishing that Decedent's constitutionally protected rights were implicated either in the awarding of the contract to Reeves County or in the monitoring of the contract by these Defendants, Plaintiffs' Amended Complaint should be dismissed as to BOP Defendants for failure to state a claim.

**C. Summary Judgment should be entered in favor of the BOP Defendants because they are entitled to the defense of Qualified Immunity**

Despite their artful pleading, Plaintiffs' entire claim arises from the alleged negligent medical treatment received by Decedent while he was housed at the RCDC III. BOP Defendants do not concede that the medical treatment received by Decedent was below minimally accepted community standards. However, for purposes of this motion, assuming said allegations to be true, the BOP Defendants are entitled to the defense of qualified immunity.

In individual-capacity suits, "qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Individual-capacity

suits “can entail substantial social costs.” *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). These costs include not only “the deterrence of able citizens from acceptance of public office,” *Harlow*, 457 U.S. at 814, but also “the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties,” *Anderson*, 483 U.S. at 638. Qualified immunity is designed to minimize these costs. *See Iqbal*, 129 S. Ct. at 1953; *Anderson*, 483 U.S. at 638; *Harlow*, 457 U.S. at 814. The protection afforded by qualified immunity is accordingly “ample.” *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The doctrine shields “all but the plainly incompetent or those who knowingly violate the law,” *id.*, and applies “regardless of whether the government official’s error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.” *Pearson*, 555 U.S. at 231 (internal quotation marks omitted). Once a defendant asserts qualified immunity as an affirmative defense, the burden shifts back to the plaintiff to rebut it. *See Beck v. Tex. State Board of Dental Examiners*, 204 F.3d 629, 633-634 (5th Cir. 2000)(citing *Whatley v. Philo*, 817 F.2d 19, 20 (5th Cir. 1987)).

1. The contracting process and contract monitoring process do not implicate Decedent’s constitutionally protected rights

Deciding a summary judgment motion based on qualified immunity involves answering two questions, either of which the court may address first. *Brown*, 623 F.3d at 253. The court must determine whether the defendant’s conduct violated a plaintiff’s constitutional right. *Id.* If not, the defendant is immune. *See Terry v. Hubert*, 609 F.3d 757, 761 (5th Cir. 2010). The court must also determine whether the right was “clearly established.” *Brown*, 623 F.3d at 253. For a right to be clearly established, “[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Anderson*, 483 U.S. at 640. Although

“the very action in question” need not have been previously held unlawful, “in the light of pre-existing law the unlawfulness must be apparent.” *Id.* In essence, to overcome qualified immunity, a plaintiff must show that “no reasonable officer could have believed his actions were proper.” *Brown*, 623 F.3d at 253.

When a defendant claims qualified immunity, and if no constitutional right has been violated, the inquiry ends and the defendant is entitled to qualified immunity. *Linbrugger v. Abercia*, 363 F.3d 537, 540 (5th Cir. 2004). In the case at bar, Plaintiffs have failed to establish that Decedent’s constitutionally protected rights were implicated in the contracting process that occurred prior to his incarceration, or in the manner in which these Defendants monitored the contract with Reeves County.

2. Assuming Decedent’s constitutionally protected rights are implicated during the contracting process or the contract monitoring process, said rights were not clearly established at the times pertinent to this lawsuit.

Assuming that Plaintiffs can establish that Decedent had some constitutionally protected right in either the contracting process or the contract monitoring process, said rights were not clearly established during the relevant time period of this lawsuit, such that these BOP Defendants can be held liable. The right must not only be clearly established in an abstract sense, but, in a more particularized sense so that it is apparent to the official that his actions are unlawful in light of pre-existing law. *Anderson*, 483 U.S. at 640. For an official to surrender qualified immunity, “pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what [the] defendant is doing violates federal law in the circumstances.” *Pierce v. Smith*, 117 F.3d 866, 882 (5th Cir.1997) (emphasis omitted). Plaintiffs have failed to establish any prior case law that implicates an inmate’s

constitutionally protected rights in the contracting process or the contract monitoring process, such that these BOP Defendants were on notice that their alleged actions would have violated Decedent's constitutional rights.

3. BOP Defendants have not deprived Decedent of adequate medical care

As noted above, the true basis of Plaintiffs' claim arises from the medical treatment received by Decedent while incarcerated at RCDC III. To state a civil rights claim for denial of medial care, a prisoner must allege that the prison authorities were deliberately indifferent to the prisoner's serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1978). A prison official is liable under the Eighth Amendment for deliberate indifference to prisoner's health and safety conditions only if he or she knows an inmate faces a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it. *Farmer v. Brennan*, 511 U.S. 825, 847 (1994). Only deliberate indifference, an "unnecessary and wanton infliction of pain ... or acts repugnant to the conscience of mankind" is proscribed by the Eighth Amendment. See *Estelle*, 429 U.S. at 105-06. Therefore, not every claim of inadequate or improper medical treatment is a violation of the Constitution. *Id.* at 105-07. For example, complaints of negligence, neglect, unsuccessful treatment, or even medical malpractice do not give rise to constitutional claims. *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991) (per curiam); *Graves v. Hampton*, 1 F.3d 315, 319 (5th Cir. 1993), *abrogated on other grounds by Arvie v. Broussard*, 42 F.3d 249 (5th Cir.1994). See also *Ruiz v. Estelle*, 679 F.2d 1115, 1149 (5th Cir. 1982) ("Neither inadvertent failure to provide adequate medical care, nor carelessness, nor even deliberate failure to conform to the standards suggested by experts is cruel and unusual punishment.") (footnotes omitted).

A prison official acts with deliberate indifference only if he knows that inmates face a substantial risk of serious harm and disregards that risk. *Farmer*, 511 U.S. at 847. “[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” *Farmer* 511 U.S. at 837. Deliberate indifference to a prisoner’s medical needs “requires a prisoner to provide evidence that prison officials ‘refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs.’” *Blayne v. Flattery*, 180 F. App’x 510, 511, 2006 WL 1307913, at \*1 (5th Cir.2006) (per curiam), citing *Domino v. Tex. Dep’t of Criminal Justice*, 239 F.3d 752, 756 (5th Cir.2001).

In the case at bar, Plaintiffs have failed to allege any facts from which it can be inferred that the BOP Defendants were deliberately indifferent to the serious medical needs of Decedent.

In Plaintiffs’ Ninth Cause of Action against Defendants Nace and Burrell, Plaintiff’s factual assertions all occurred prior to the time that Decedent was ever in the custody of the BOP. Neither Defendants Nace nor Burrell were aware of any facts which would have put them on notice that Decedent had any serious medical needs which were not being attended to.

Assuming arguendo that Plaintiffs can establish that Decedent had a constitutionally protected right in the contracting process, Plaintiffs have nonetheless failed to assert any facts establishing that either Defendant Nace or Burrell were deliberately indifferent to the serious medical needs of Decedent.

Plaintiffs cite to an investigation by the Department of Justice into the medical treatment provided by PNA at a Santa Fe, New Mexico correctional facility in 2003. Plaintiffs do not allege that this facility housed BOP inmates or that either Defendant Nace or Burrell were aware of this

investigation. Indeed, neither of these Defendants were aware of this investigation. (See Exhibits 1 and 2, respectively.)

Plaintiffs also cite the operation of a facility by GEO in North Carolina. Plaintiffs do not assert that the medical care provided at this facility was provided by PNA. More importantly, Plaintiffs do not assert that either Defendant Nace or Burrell had any knowledge of the alleged deficiencies.

Critical also in its absence, is any evidence that these two isolated incidents in any way would put a contracting official on notice that awarding a contract to Reeves County, with a subcontract to GEO and PNA, would result in the alleged substantial risk of harm to Decedent two years later. Absent evidence that Defendants Nace and Burrell were aware of the facts alleged by Plaintiffs and that they inferred from these facts that Decedent would be exposed to a substantial risk of serious harm, Plaintiffs' claims must fail.

Again, assuming arguendo that these Defendants were aware that both GEO and PNA had a history of providing substandard medical care to inmates, the inquiry does not end there. If it is determined that the official's conduct was unconstitutional, then the court must decide whether the conduct was nonetheless "objectively unreasonable." *See Eugene v. Alief Indep. School Dist.*, 65 F.3d 1299, 1305 (5th Cir. 1995), *cert. denied sub nom. Conley v. Eugene*, 517 U.S. 1191 (1996).

In the case at bar, prior to awarding the contract to Reeves County, the BOP had been provided information that Reeves County had re-engineered their Quality Control Plan which was specifically tailored to the BOP contract facility monitoring (CFM) guidelines. Additionally, the Reeves County complex had undergone their annual review by the Texas Commission on Jail Standards and received a perfect score of 100%.

The BOP took further precautions in the contract with Reeves County by requiring that RCDC III acquire certification of its Health Services by ACA and JCAHO. Additionally, the contract required that RCDC III submit to a semiannual inspection by the BOP of all facets of its operations, to include the Health Services. Inclusion of these provisions in the contract to ensure that Reeves County was providing proper medical care to inmates incarcerated in RCDC III was an objectively reasonable response to any concerns regarding medical care provided to inmates. *See Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (agents entitled to qualified immunity because their decision was reasonable, even if mistaken). In *Hunter*, the Supreme Court explained: The qualified immunity standard "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law." *Id.*, quoting *Malley*, 475 U.S. at 343. This accommodation for reasonable error exists because "officials should not err always on the side of caution because they fear being sued." *Hunter*, 502 U.S. at 229 (citation omitted).

Likewise, Plaintiffs' claims in their Tenth Cause of Action must fail. Plaintiffs assert Decedent was subjected to substandard medical treatment while housed at RCDC III and that employees of GEO and PNA utilized the SHU to punish inmates who complained of inadequate treatment. Plaintiffs do not allege that Defendants Burrell, De Jesus or Grube participated in these decisions, rather Plaintiffs assert that these Defendants had a duty to monitor the contract performance by Reeves County, GEO and PNA. Plaintiff's further allege that Defendants Burrell, De Jesus and Grube either knew or should have known of the treatment received by Decedent and failed to take corrective measures.

Neither Defendants Burrell or De Jesus had any knowledge of Decedent prior to his death. Defendant Grube does not recall knowing of Decedent prior to his death, but does recall an inmate

who was being monitored in the SHU for medical purposes. Again, Plaintiffs have failed to establish that Decedent had a constitutionally protected right in the manner in which the BOP monitored the contract with Reeves County.

Assuming arguendo that Decedent did enjoy a constitutionally protected right in the contract monitoring process, Plaintiffs have failed to allege any facts that Defendants Burrell, De Jesus or Grube acted deliberately indifferent to the medical needs of Decedent.

Defendant Burrell was not located at Reeves County and he did not know Decedent. The contract entered into between the BOP and Reeves County, for which Defendant Burrell was the Source Selection Official, required that RCDC III be certified by ACA and JCAHO and further required that the facility be audited semiannually by the BOP. RCDC III received accreditation by the ACA in September 2008, prior to the death of Decedent. It received accreditation by JCAHO in February 2009, just after the death of Decedent. RCDC III was inspected by a BOP audit team in June 2008 and the medical services were rated as acceptable. Plaintiffs cannot establish that Defendant Burrell acted with deliberate indifference.

Defendant De Jesus was one member of an inspection team that performed an audit of RCDC III. His role was to evaluate the medical services provided at RCDC III by reviewing a sample of inmate records. Defendant De Jesus did not treat any inmates and did not have the authority to dictate any changes in procedures. His role was simply to perform an evaluation and submit his findings to the Monitor in Charge, who would then prepare a preliminary report, which would be submitted up the chain of command until a final report was issued. In this case, the final report for June 2008 found that the medical services provided at RCDC III were “acceptable.” Plaintiffs cannot establish that Defendant De Jesus acted with deliberate indifference.

Defendant Grube did not arrive at RCDC III until August 2008, just a little over three months before Decedent's death. Prior to her arrival, Defendant Grube had no knowledge of Decedent, GEO or PNA. Ms. Grube cannot recall any specific information about Decedent, but does recall asking the warden about an inmate who was in SHU and the warden responding that the inmate was in the SHU so that they could monitor his condition closely and for his own protection. Ms. Grube is not a health care professional and believed the explanation to be reasonable. Plaintiffs cannot establish that Defendant Grube acted with deliberate indifference.

4        **BOP Defendants cannot be held vicariously liable for the alleged negligent treatment of Decedent**

Defendants Nace, Burrell and Grube are not health care providers and are not competent to make medical decisions regarding the medical treatment of inmates. Defendant De Jesus is a physician, however, he did not provide any medical care to Decedent or any other inmates at RCDC III. His only role was to review medical records. None of the BOP Defendants were involved in the medical treatment of Decedent. Nonetheless, Plaintiffs are attempting to hold these BOP Defendants liable for the alleged negligent medical treatment received by Decedent.

In order to assert a *Bivens* cause of action against a federal supervisory official, a plaintiff must show either that the supervisory official was personally involved in the acts causing the deprivation of a persons' constitutional rights, or "implement[ed] a policy so deficient that the policy itself acts as a deprivation of constitutional rights." *Oladipupo v. Austin*, 104 F. Supp.2d 623, 625 (W.D. La. 2002), quoting *Cronn v. Buffington*, 150 F.3d 538, 544 (5th Cir.1998). Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory

of *respondeat superior*. *Iqbal*, 129 S. Ct. at 1948; *Reimer v. Smith*, 663 F.2d 1316, 1323 (5th Cir. 1981); *Cronn*, 150 F.3d at 544.

In the case at bar, the contract between the BOP and Reeves County required that Reeves County provide for the proper medical treatment of inmates. To ensure that inmates received proper medical care, the contract required that RCDC III receive ACA and JCAHO accreditation and that it submit to semiannual audits of its health services. The contract further provided for an onsite contract officer to ensure that Reeves County was in compliance with the contract. These are not constitutionally deficient policies. Plaintiffs' allegations that BOP Defendants failed to adequately monitor the contract with Reeves County is insufficient to establish liability on the part of these BOP Defendants.

### **III. CONCLUSION**

Plaintiffs' *Bivens* claims against BOP Defendants are due to be dismissed because Plaintiffs have failed to establish that Decedent's constitutionally protected rights are implicated either in the contracting process that resulted in a contract being awarded to Reeves County to operate RCDC III, or in the contract monitoring process regarding the operations at RCDC III.

BOP Defendants are entitled to Summary Judgment because Plaintiffs have failed to establish that Decedent's constitutionally protected rights were violated by the BOP Defendants, or that his constitutionally protected rights were clearly established at the times relevant to this lawsuit. Additionally, Plaintiffs have failed to establish that BOP Defendants were deliberately indifferent to the serious medical needs of Decedent. Finally, BOP Defendants' actions were objectively reasonable in their efforts to ensure that inmates at RCDC III received proper medical care.

WHEREFORE, PREMISES CONSIDERED, BOP Defendants pray that their Motion to Dismiss or, in the alternative, Motion for Summary Judgment be granted, that Plaintiffs' Amended Complaint be dismissed as to the BOP Defendants and that they be awarded costs and for any further relief to which they may be entitled.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 15th day of August, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
EL PASO DIVISION**

**GRACIELA GALINDO, *et al.*,**

§

**Plaintiffs,**

§

v.

**EP-10-CV-454-DB**

**REEVES COUNTY, TEXAS, *et al.*,**

§

**Defendants.**

§

**ORDER**

On this date, came on to be considered Bureau of Prison Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment, in the above- entitled and numbered cause and the Court having considered said Motion is of the opinion that it should be GRANTED.

IT IS THEREFORE, ORDERED that Plaintiffs' Complaint is hereby DISMISSED with prejudice. Plaintiffs shall bear all costs.

SIGNED and ENTERED this \_\_\_\_\_ day of \_\_\_\_\_, 2011.

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**DAVID BRIONES**  
SR. UNITED STATES DISTRICT JUDGE